No. 10-3598

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SECRETARY OF LABOR,

Plaintiff-Appellant,

v.

CYNTHIA HOLLOWAY and JAMES DOYLE,

Defendants-Appellees.

BRIEF OF THE SECRETARY OF LABOR

On Appeal from the United States District Court for the
District of New Jersey

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor, Plan
Benefits Security Division

ELIZABETH HOPKINS
Counsel for Appellate and
Special Litigation

MARCIA BOVE
Senior Trial Attorney
U.S. Department of Labor
Office of the Solicitor
P.O. Box 1914
Washington, D.C. 20013
202-693-5598

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STATEMENT OF RELATED CASES AND PROCEEDING

This case has not been before this Court previously, nor is the Secretary aware of any related cases or proceedings related to this appeal.

STATEMENT OF APPELLATE AND SUBJECT MATTER JURISDICTION

This is an action brought by the Secretary of Labor under 29 U.S.C. §§ 1132(a)(2) and 1132(a)(5). The United States District Court for the District of New Jersey had federal question jurisdiction under 28 U.S.C. § 1331, and exclusive subject matter jurisdiction under 29 U.S.C. § 1132(e)(2).

The Court of Appeals for the Third Circuit had jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final judgment entering a consent judgment against one defendant (Marc Maccariella), a default judgment against a second defendant (Michael Garnett), and entering judgment as a matter of law in favor of the remaining two defendants (James Doyle and Cynthia Holloway). The judgment was entered on June 30, 2010. The Secretary filed a timely notice of appeal on August 26, 2010.

STATEMENT OF THE ISSUES

In this case, the Secretary of Labor sued the fiduciaries of an abusive and now-defunct multiple employer welfare arrangement (MEWA), a benefit plan governed by the Employee Retirement Income Security Act

(ERISA), 29 U.S.C. § 1001 et seq. Although the MEWA collected more than $7.4 million from employers and their employees for health benefits, only $2.7 million was used for that purpose, leaving millions in unpaid claims when the welfare fund was terminated. The questions presented are:

1. Whether the District Court erred by ruling that Holloway did not breach her fiduciary duties as trustee when the evidence showed that she failed to prudently manage the Fund and did little or nothing to prevent the diversion of its assets. JA 27 and JA 28-29.

2. Whether any or all of the amounts paid by employers and employees in order to obtain health benefits under the plan were plan assets. JA 23-24.

3. Whether Doyle was a functional fiduciary by virtue of his control over plan assets. JA 29

4. Whether Doyle breached his fiduciary duties to the Fund by allowing plan assets to be diverted for the payment of services that were unnecessary or not provided. JA 29

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings and disposition below

In this civil enforcement action under ERISA, the Secretary alleged that the defendants, who were fiduciaries of an abusive and now-defunct multiple employer welfare arrangement (MEWA), the Professional Industrial & Trade Workers Union (PITWU) Health & Welfare Fund (the Fund), breached their fiduciary duties in violation of section 404(a) of ERISA (29 U.S.C. § 1104(a)) by mismanaging the Fund, and failing to prevent other fiduciaries from committing breaches and were therefore liable under section 405 of ERISA (29 U.S.C. § 1105). Originally, the Secretary brought suit against four individuals associated with the Fund – James Doyle, Cynthia Holloway, Michael Garnett and Mark Maccariella.

On June 30, 2010, following a trial, the district court entered default judgments against Maccariella, who agreed to a consent order enjoining him from future activity in the area and requiring him to pay $195,317, and against Garnett, who failed to appear at trial. Solis v. Doyle, No. 05-2264, slip op. at JA 6, JA 10 (D.N.J. June 30, 2010) (hereinafter "Op."). The district court granted judgment as a matter of law under Fed. R. Civ. P. 50(b) in favor of Defendants Holloway and Doyle, ruling that there was insufficient evidence that Holloway, a Fund trustee, had breached her fiduciary duties and that the evidence did not support that defendant Doyle was a functional fiduciary because it did not show that he exercised authority or control over plan assets. Id. at 18-19. This appeal followed.

B. Statement of the facts

1. On May 1, 2001, Holloway and three other individuals created the Fund, which, before it closed in 2003, provided health insurance through supposed collective bargaining agreements between PITWU, the Fund sponsor, and its participating employers. JA 7. Defendants Holloway and Garnett were named trustees to the Fund during relevant periods in 2001 and 2002. JA 3.

In addition, Garnett and Maccariella were owners of two companies – Privilege Care, Inc. (PCI) and North Point PEO Solutions, Inc. (essentially operated as one enterprise) – that entered into contracts with the participating employers supposedly to provide human resource services and access to health insurance provided by the Fund. JA 3.

Defendant Doyle was the owner of Privilege Care Marketing Group, Inc. (PCMG), an entity that provided marketing and billing services to PCI and North Point and enrolled employers to purchase health insurance coverage under the Fund. JA 9.

Holloway remained Fund trustee from May 1, 2001 to September 22, 2002. JA 3. During that time, she had authority to manage the Fund, including the authority to sign checks drawn on the Fund's claim and general accounts. Id. at JA 7. The Fund operated for only two years, from May 2001 to May 2003. Id. at JA 10, JA 15.

To obtain medical benefits from the Fund, a member's employer was required initially to pay the first month's fee, usually as a single check, from which PCMG would deduct a marketing and billing fee of up to 40%. JA 135-136, JA 138-140, JA 144, JA 457. Thereafter, employers were required to pay monthly fees through two checks. JA 44, JA 48-49. One check (Check 1) was payable to PCI/North Point (although Doyle's company, PCMG, sometimes took a cut). JA 145. PCI/North Point would, in turn, forward a portion to a third-party administrator for processing and paying health claims and retain the rest for "union dues" and other expenses. JA 162, JA 133, JA 136-137, JA 142, JA 145, JA 155. The other check (Check 2) was made out to and retained by PCMG (and Defendant Doyle) for marketing services and administrative expenses (Check 2). JA 145-146.

During 2002 and 2003, seven states took enforcement actions against Doyle, PCMG, PCI/North Point, Garnett, Macariella, and Holloway that resulted in cease and desist orders. JA 353-JA 427. Despite these state enforcement actions, Holloway took no action to end the Fund’s relationship or service agreements with Doyle, Garnett, Macariella, or the entities they controlled, PCMG and PCI/North Point. Moreover, Doyle was later convicted of a felony in Texas for the unauthorized sale of insurance. JA 491-495.

Although Holloway was not named personally in these orders before she resigned, it is undisputed that she knew of the orders and, as the district court noted, the orders were one of the concerns she identified as a reason for her resignation as a trustee. JA 14. Further, it is undisputed that Doyle was aware of these orders during the relevant time period. JA 251, JA 252, JA 253.

During the two years the Fund operated, it had four contract administrators: its original administrator, Union Privilege Care; Oak Tree Administrators (Oak Tree) (March 2002 through June 2002); Brokerage Concepts, Inc. (July 1, 2002 through November 2002); and Southern Plan Administrators (December 2002 through May 2003). JA 10, JA 15.

Holloway knew from at least April 23, 2002, that the Fund was plagued by systemic administrative deficiencies. Before abandoning the Fund, she attended at least three meetings during which two different Fund administrators informed her that the Fund could not pay claims and did not have adequate financial or claim records. JA 10, 12, 13.[1] On April 23, 2002, Oak Tree informed Holloway that the Fund had "many" unpaid claims and that Union Privilege Care might not have paid any benefit claims since November 2001. Id. at JA 10. After learning that Union Privilege Care

[1] Holloway resigned before Southern Plan Administrators, the fourth administrator, took over claims administration in December 2002.

likely had not paid benefit claims for at least six months, Holloway did not initiate any action against Union Privilege Care. Id. at JA 14. In fact, on May 1, 2002, "Holloway and another trustee appointed David Weinstein [the owner/operator of Union Privilege Care] as a trustee of the Fund, although Holloway admitted she had general concerns about Weinstein." Id. at JA 10-JA 11. Holloway did not investigate Weinstein's qualifications to be a trustee. JA 186.

Again during a May 30, 2002 meeting, Oak Tree informed Holloway that it "still was not able to obtain necessary financial information and documents from Union Privilege Care relating to prior claims and expenses; therefore, the accountant was unable to provide the trustees with a financial report, and no actuary could have performed a study." JA 12. By at least September 20, 2002, PCI/ North Point had stopped making contributions to the Fund (id. at JA 13), and the Fund's third administrator, Brokerage Concepts, informed Holloway of that fact during a September 20, 2002 meeting with her. JA 13. Holloway admitted at trial that the Fund's accountant was unable to give her a financial report, could not determine the amount of contributions paid into the Fund, could not determine the amount of claims paid, and probably did not even have a complete list of Fund participants. JA 188; JA 189, JA 10, JA 12-13.

At no time did Holloway instruct the Fund's counsel to initiate legal action against Union Privilege Care, PCI/North Point, PCMG, or the other trustees. JA 14 Nor did she seek mediation "of her dispute with the other trustees regarding administration of the Fund," contact the Department of Labor about the lack of funding or the Fund's chaotic condition, or seek removal of any trustee. Id. Instead, Holloway simply resigned on September 27, 2002. Id. In her resignation letter, she summarized her reasons: "the lack of financial accountability for contributions to the Fund and resultant lack of funding to pay claims" and the "issuance of cease and desist orders by multiple states." Id.

2. On April 28, 2005 the Secretary filed suit alleging that the individual defendants were all fiduciaries who violated their duties under ERISA by failing to administer the assets of the Fund for the exclusive purpose of providing benefits to its participants and beneficiaries and defraying legitimate Fund expenses. The Secretary argued that the defendants breached their duties by diverting or allowing the diversion of $4.7 million out of a total of $7.4 million in contributions to pay improper marketing fees to PCMG, improper service fees to PCI/North Point, which provided no services, union dues to PITWU, a sham union that did not engage in collective bargaining, and other unnecessary expenses.

Secretary's Post-Trial Memorandum of Law (Hereinafter "Post-Trial Br."), at JA 256, JA 273- 275.

Thus, the Secretary argued that the marketing and "union dues" were improper, and that the other fees were not legitimate because they were not for any discernible services. JA 304-307 Moreover, the Secretary argued that Defendant Holloway, despite her acknowledgment of serious mismanagement of the Fund, did little or nothing to try to ensure that the Fund to which she was a trustee was properly administered. JA 311-315

3. The court did not address the argument that all the amounts submitted constituted plan assets. Instead, the court began its analysis by noting that the Secretary did not allege that "the amount of money coming into the Fund was too low for the number of participants." JA 17. Discounting the testimony by individuals that they had unpaid claims, the court found that there was no testimony that there were unpaid claims as of May 2003, when the Fund closed. Id. Furthermore, the court credited Doyle's testimony "that he had a contract to provide a service to an employer which was part of a bona fide collective bargaining agreement, and he forwarded all monies which he was required to present" to PCI/North Point for securing benefits, keeping "PCMG's consultant fees and profits separate by virtue of 'check 2' in an effort not to commingle funds." JA 17 Finally,

the court concluded that the Secretary "introduced no evidence that the fees charged were excessive, unreasonable or contrary to plan documents," and on this basis, entered a "directed verdict" under Rule 50, although the case was not tried to a jury. JA 19.

STANDARD OF REVIEW

The standard of review for orders granting judgment as a matter of law is plenary and a reviewing court applies the same standard as the district court. McGreevy v. Stroup, 413 F.3d 359, 363-64 (3d Cir. 2005). A motion for judgment as a matter of law under Rule 50 should be granted only "if, viewing the evidence in the light most favorable to the nonmovant and giving it the advantage of every fair and reasonable inference, there is insufficient evidence from which a jury reasonably could find liability." Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1166 (3d Cir.1993); accord Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir.1996) (Rule 50 motion "should be granted only if, viewing the evidence in the light most favorable to the nonmoving party, there is no question of material fact for the jury and any verdict other than the one directed would be erroneous under the governing law") (internal quotations omitted); McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 356 (1991) ("a directed verdict is mandated where the facts and the law will reasonably support only one conclusion").

However, Rule 50, by its terms, is applicable only to cases tried to a jury, and accordingly, most courts have treated a Rule 50 decision as a judgment on partial findings under Rule 52(c) where, as here, it was entered by a judge after a bench trial. See Federal Ins. Co. v. HPSC, Inc., 480 F.3d 26, 32 (1st Cir. 2007). In such a case, the district court's conclusions of law are reviewed de novo, In re Merck & Co., Inc., Sec., Derivative & ERISA Litig., 493 F.3d 393, 399 (3d Cir. 2007), while its findings of fact are reviewed for clear error, United States v. U.S. Gypsum Co., 333 U.S. 364, 394-395 (1948).

Even under a clear error standard of review, however, if specific facts support the ultimate factual findings, the district court must articulate those facts, and a failure to do so may support reversal. O'Neill v. United States, 411 F.2d 139, 146 (3d Cir.1969) (if subordinate findings were reached in the process of arriving at the ultimate factual conclusion, they must be articulated). This is particularly true where, as here, the legal issue is whether a defendant's conduct met the applicable standard of care. Id. at 146.

SUMMARY OF THE ARGUMENT

The district court erred as a matter of law when it ruled that there was no evidence to support a finding that Holloway violated section 404(a)(1)(A) and (B) of ERISA, 29 U.S.C. § 1104(a)(1)(A) and (B), which requires fiduciaries to act with prudence and for the exclusive benefit of the plan participants and beneficiaries. These core fiduciary duties of prudence and loyalty are the highest known to the law. The evidence in this case showed that Holloway, a plan trustee, utterly failed to ensure the Fund's prudent administration and did nothing to prevent the diversion of millions of dollars in plan assets to pay excessive fees for services that were unnecessary or not provided. This evidence does not just permit a finding that Holloway's conduct failed to meet the exacting fiduciary standards imposed by ERISA, it virtually mandates such a conclusion.

The district court also erred when it failed to address the Secretary's argument that the funds collected by Doyle were plan assets under the terms of the Fund's governing documents or to consider the evidence supporting this conclusion. The court therefore erred when it concluded that Doyle was not a fiduciary within the meaning of 29 U.S.C. § 1002(21)(A), even though the evidence showed that he exercised authority and control over most of the money collected from employers participating in the Fund by negotiating the submitted checks, and disbursing funds from the checks to pay the Fund's medical service providers, administrator, and purported union dues to the Fund's sponsor.

Finally, the district court erred when it ruled that neither Holloway nor Doyle were liable for the breaches of other defendants under section 405 of ERISA, 29 U.S.C. § 1105, which makes a fiduciary liable for the acts of another fiduciary if he knows of a fiduciary breach but fails to take steps to prevent it. The evidence presented by the Secretary showed that both Holloway and Doyle knew that Doyle, through PCMG, and the other defendants were diverting millions in plan assets and that neither took any action to prevent the diversion of plan assets by PCMB and PCI/North Point.

ARGUMENT

A. ERISA sections 404 and 405 Fiduciary Duties

ERISA section 404(a) imposes on ERISA plan fiduciaries the "[p]rudent man standard of care." 29 U.S.C. § 1104(a). Section 404(a)(1) states that the fiduciary must discharge his duties "solely in the interest of the [ERISA plan] participants and beneficiaries," 29 U.S.C. § 1104(a)(1), and must do so with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, id. § 1104(a)(1)(B).

"Prudence," under ERISA, is measured "according to an objective standard," in accord with common law trust principles. In Re Unisys

Savings Plan Litig., 74 F.3d 420, 434 (3rd Cir 1996). Thus, "[t]he fiduciary obligations of the trustees to the participants and beneficiaries of [an ERISA] plan are those of trustees of an express trust – the highest known to the law." Donovan v. Bierwirth, 680 F.2d 263, 272 n. 8 (2d Cir. 1982).

When a fiduciary is aware of a risk to the plan and its assets, he must fully investigate that risk and take appropriate action to protect the fund from that risk. See generally Bierwirth, 680 F.2d at 273-76; Chao v. Merino, 452 F.3d 174, 182 (2d Cir. 2006) ("If a fiduciary was aware of a risk to the fund, he may be held liable for failing to investigate fully the means of protecting the fund from that risk."). A fiduciary may be held liable for failing to investigate fully the means of protecting the fund from a known risk. Id. at 182 (applying the prudence standard, fiduciary found liable for hiring a firm to collect contributions when it had previously misappropriated contributions); In Re Unisys Savings Plan Litig., 74 F.3d 420, 435 (3rd Cir 1996) (ruling in the context of an investment decision that the most basic of ERISA's fiduciary duties is the duty to conduct an independent investigation).

Further, a resigning ERISA plan trustee must "satisfy ERISA's fiduciary standard of care, in addition to whatever contractual duties may be set forth in the plan documentation." Ream v. Frey, 107 F.3d 147, 154 (3d

Cir. 1997). "A trustee may be liable for a breach of fiduciary duty for resigning without providing for a 'suitable and trustworthy replacement.'" Id. (quoting Friend v. Sanwa Bank California, 35 F.3d 466, 471 (9th Cir. 1994)); Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Secs., Inc., 93 F.3d 1171, 1183 (3d Cir.1996) ("Courts that have considered the issue have held that an ERISA fiduciary's obligations to a plan are extinguished only when adequate provision has been made for the continued prudent management of plan assets."); Restatement of the Law (Second) Trusts § 106.

In addition, "fiduciaries may be liable under § 1105(a) even if their co-fiduciary breach is beyond the scope of their own discretionary authority." In re Polaroid ERISA Litig., 362 F. Supp. 2d 461, 481 (S.D.N.Y. 2005). See also In re Worldcom, Inc. ERISA Litig., 354 F. Supp. 2d 423, 445 (S.D.N.Y. 2005) ("every ERISA fiduciary, regardless of the parameters of its duties, is subject to the co-fiduciary liability provision of Section 405(a)," 29 U.S.C. § 1105(a)).

B. The District Court Erred When It Ruled that Holloway Did Not Breach her Fiduciary Duties as Trustee When the Evidence Showed That She Failed to Prudently Manage the Fund and Did Nothing to Prevent the Diversion of its Assets.

Holloway was a trustee of the Fund and therefore was an ERISA fiduciary as a matter of law. Srien v. Frankford Trust Co., 323 F.3d 214, 222-23 (3d Cir. 2003) (trustee bank is an ERISA fiduciary). Although Holloway's fiduciary status was undisputed, the district court erred in ruling that she did not breach her fiduciary duties to the Fund. As explained below, the district court's findings compel a contrary conclusion.

The district court found that, before resigning, Holloway attended at least three meetings during which two different Fund administrators informed her that the Fund could not pay all its claims and did not have adequate financial or claim records. JA 10, 12-13. For instance, on April 23, 2002, the plan administrator at that time, Oak Tree, informed Holloway that "there were many pending claims" and that Union Privilege Care probably had not paid claims since November 2001. Id. at 10. Nothing improved; during a May 30, 2002 meeting, Oak Tree again informed Holloway that Union Privilege Care continued not to provide "necessary financial information and documents" about "prior claims and expenses." JA 12. During a September 20, 2002 meeting, Brokerage Concepts, the Fund's third administrator, informed Holloway that PCI/North Point was not even making contributions to the Fund. JA 13.

The district court found that, despite this knowledge, Holloway did not instruct the Fund's counsel to initiate legal action against Union Privilege Care, PCI/North Point, PCMG, or the other trustees. JA 14. Likewise, she did not seek mediation "of her dispute with the other trustees regarding administration of the Fund" or "contact the Department of Labor to complain about the lack of funding, lack of accountability, or 'chaotic state of affairs,'" or seek removal of any trustee. Id. Instead of pursuing any of these options, Holloway simply walked away from the problems by resigning on September 27, 2002. Id.

In her resignation letter, Holloway summarized her reasons, and the resignation letter itself is undisputed evidence of the Fund’s "chaotic" condition and of Holloway's clear recognition of that fact. JA 14. The district court quoted Holloway's succinctly stated reasons for resignation: "the lack of financial accountability for contributions to the Fund and resultant lack of funding to pay claims" and the "issuance of cease and desist orders by multiple states." Id.

Far from pursuing Union Privilege Care or its owner, David Weinstein, Holloway and her fellow trustees appointed Weinstein as a Fund trustee on May 1, 2002, after Oak Tree informed her in April that Union Privilege Care had failed to provide necessary claim and expenses records and might not have paid claims since November of 2001. JA 10–11. As the district court noted, "Holloway admitted she had general concerns about Weinstein" when she appointed him as a Fund Trustee. Id. at 11.

Holloway's initial and continuing failure to investigate the magnitude of the unpaid claims or to obtain accurate financial and claim records from Union Privilege Care was a breach of her duties of prudence and loyalty. Chao v. Merino, 452 F.3d at 182 (a fiduciary who turns a blind eye to a known risk "may be held liable for failing to investigate fully the means of protecting the fund from that risk"). Likewise, Holloway breached her duties of loyalty and prudence when she appointed Weinstein even though she had reason to doubt whether he was trustworthy. Id. (upholding district court's permanent injunction against fiduciary who did nothing to protect fund from an individual whom she had reason to know might be untrustworthy until he embezzled from the fund a second time).

Holloway then compounded her disloyalty and imprudence by simply walking away from an ERISA plan that she knew was in chaos. Given Holloway's own recognition of the Fund's "chaotic" status, simply resigning without taking meaningful action to protect it was not an option permitted by ERISA. Ream, 107 F.3d at 154; Glaziers and Glassworkers Union Local No. 252 Annuity Fund, 93 F.3d at 1183 (an ERISA fiduciary's duties to a plan are extinguished only when adequate provision has been made for its prudent management).

Indeed, the district court expressly found that the Fund was in "chaotic" condition, and that Holloway resigned because of these circumstances, all of which developed while she was a trustee responsible for managing and protecting the Fund and its assets. JA 18 (citing JA 192–193). These findings virtually compel the conclusion that Holloway breached her duties of loyalty and prudence under ERISA section 404(a)(1)(A) and (B), 29 U.S.C. § 1104(a)(1)(A) and (B).

Moreover, given these findings, the district court's conclusion that Holloway discharged her duties as an ERISA fiduciary because she took some "affirmative steps" to address the Fund's problems, is clearly erroneous. First, the court found that "[a]t some point, Holloway instructed the Fund's attorney 'to bring some accountability to the Fund, but he asked [Holloway] to talk to the trustees about that,'" and did nothing himself. JA 13. The district court also found that Holloway "took steps to try to get membership information from PCI." Id. These halfhearted and unsuccessful steps were plainly inadequate given Holloway's ultimate decision to simply abandon the Fund despite knowing that there was no accurate membership data, inadequate financial and claim records, unpaid claims, and no accountability on the part of those administering the Fund. Id. at 10-12, 13-14, 18.

Nor were the steps that Holloway took after resigning – when she "continued to be active in the administration and correction of Fund issues … continued to seek payment of outstanding claims, continued to contact people to obtain additional information, and continued to seek advice of counsel," JA 14 – sufficient to discharge her duties to the Fund. See also id. at 15 (discussing meeting that Holloway attended in October 2002 where "the topic was that the Fund was underfunded" and a decision was made "to increase rates"). Holloway took these steps, not to secure payment for the Fund's participants in general, but solely in an attempt to secure payments for the employers that she had recruited. JA 197-198, 194. At best, the court below erred in granting judgment to Holloway on the basis of this mitigating evidence given the countervailing evidence of Holloway's failings, including her failure to secure a good replacement when she resigned, and her acknowledged failure to warn the employers participating in the Fund of the state cease and desist orders. JA 197-198, 194. At worst, the court's ruling undermines established Third Circuit precedent requiring a resigning fiduciary to adequately provide for the prudent management of an ERISA plan before her fiduciary duties may be extinguished. Ream, 107 F.3d at 154; Glaziers and Glassworkers Union Local No. 252 Annuity Fund, 93 F.3d at 1183.

Moreover, the district court did not address the Secretary's request for injunctive relief against Holloway, who, as a trustee and thus a gatekeeper, opened the Fund's door to the looters and then resigned in the wake of the resulting chaos. The Secretary was entitled to an injunction against the possibility that she might put other plans at risk in the future. Beck v. Levering, 947 F.2d 639, 641 (2d Cir. 1991) ("ERISA imposes a high standard on fiduciaries, and serious misconduct that violates statutory obligations is sufficient grounds for a permanent injunction"); Martin v. Feilen, 965 F.2d 660 (8th Cir. 1992) (finding an abuse of discretion for district court not to issue injunction barring individuals from providing fiduciary or other services to ERISA plans). Indeed, even if this Fund suffered no monetary losses based on Holloway's breaches, her pervasive derelictions suffice to warrant injunctive relief. Brock v. Robbins, 830 F.2d 640, 646-47 (7th Cir. 1987) (injunctive relief may be appropriate even if no loss to the plan has occurred).

C. The District Court Erred by Failing to Address Whether Any Or All Of The Amounts Paid Were Plan Assets

Although ERISA is designed to ensure the prudent and loyal management of ERISA plans and their assets, and the Act's definition of fiduciary includes persons who exercise authority over plan assets, ERISA does not separately define what constitutes "plan assets" for statutory purposes. John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 510 U.S. 86, 89 (1993). Absent a specific regulation or statutory provision, the Department has consistently taken the position that "ordinary notions of property rights under non-ERISA law" should be used to identify plan assets. See, e.g., U.S. Dep't of Labor, Advisory Opinion ("AO") 92-22A, 1992 WL 314116 (Oct. 27, 1992); AO 93-14A, 1993 WL 188473 (May 5, 1993); AO 94-31A, 1994 WL 501646 (Sept. 9, 1994); AO 2005-08A, 2005 WL 1208695 (May 11, 2005).[2] Thus, plan assets include any property, tangible or intangible, in which the plan has a "beneficial ownership interest" as determined under ordinarily applicable property law. AO 93-14A. Rather than create a unique property-law regime for employee benefit plans, the courts typically determine whether an asset belongs to a plan by applying the same concepts and principles that they would normally apply in resolving property disputes. See, e.g., In re Halpin, 566 F.3d 286, 289-90 (2d Cir. 2009) In re Luna, 406 F.3d 1092, 1200-05 (4th Cir. 2005).

[2] The Secretary has promulgated a regulation that defines plan assets with respect to participant contributions, which makes clear that if such contributions are made through wages withheld, they become plan assets as soon as they can reasonably be segregated from an employer's general assets. 29 C.F.R. § 2510.3-102. Although two of the witnesses testified that some employees made contributions for their health coverage, the extent and significance of any such contributions were not developed in the district court.

ERISA imposes minimum funding standards on defined benefit pension plans, 29 U.S.C. §§ 1080-1086, and requires all pension plans to be funded by trusts holding plan assets. Id. §§ 1002(34), 1103. ERISA, however, does not impose these same requirements on welfare plans. Thus, a plan sponsor may simply pay for employee welfare benefits from its general assets, in which case there may well be no "plan assets" as such. However, if the sponsor of a welfare plan creates and funds a trust on the plan's behalf, sets up a separate account with a third party in the plan's name, or specifically indicates in plan documents or instruments that particular funds belong to the plan, then those funds become plan assets. See AO 94-31A (Sept. 9, 1994). Accordingly, identification of plan assets requires consideration of any contract or other legal instrument involving the plan, as well as the actions, omissions, and representations of the relevant parties. Here, as discussed below, the relevant plan documents together with defendants' omissions, actions, and representations manifested their intent to create a trust and to contribute the payments made by the participating employers to it on behalf of the PITWU Fund.

The PITWU Fund created by the Declaration (JA 342) purported to establish a trust fund "into which shall be paid on and after May 1, 2001, any and all contributions payable by Employers or any other Employer who has agreed, in writing, to be bound by the terms of this Agreement." Id. The Declaration, which was signed by the trustees and never seen by the participating employers, did not define what these "contributions" were to consist of, but did provide that the contributions were to be paid "by each Employer by check payable to the order of the Trust Fund," which was required to be endorsed by signature of two trustees. JA 454 In practice, PITWU, Holloway, and Doyle ignored the Declaration. Instead, employers wrote two monthly checks to obtain health benefits for their employees: one to PCI/North Point and one to PCMG, both of which went to Doyle. As explained below, Doyle retained all of Check 2 and approximately 30% of Check 1. Doyle forwarded the remaining 70% of Check 1 to PCI/North Point.

The agreements between PITWU and PCI/North Point stated that employers "shall deduct from each employee an amount equal to the membership dues uniformly required as conditions of acquiring and retaining membership in the Union, provided the employer has authorization from the employee." JA 428, 441. They also provided that the "employer shall contribute monthly, to be in the hands of the Fund Administrator on or before the first day of the current month," amounts set forth in an addendum "for each employee covered by" the agreement. JA 428,G JA 448 (emphasis added). The agreements further provided that "<u>the amounts shall be used by said health Fund</u> for the purpose of financing the health Fund for the benefit of participating employees for the purpose of providing hospitalization, basic and major medical benefits." JA 428, JA 448 (emphasis added). The agreements did not provide for marketing or any other expenses to be deducted. <u>Id.</u> Inexplicably, however, the amounts in the agreements did not correspond to any of the amounts being paid by participating employers.

Although the employers never saw these agreements or Declaration, when enrolling for benefits, newly-enrolled employers had to sign several other forms to participate in the Fund. The first was the New Business Turn-In Form which set forth a total amount to be paid, which explicitly included a one-time processing fee and a $10 monthly billing fee apparently per employee. JA 457. The second form gave basic health and other identifying information about each participant. JA 458-459. The third form, entitled North Point PEO Service Contract Agreement, allowed employers to check off the "union" services desired, including payroll, workers' compensation and, of course, health benefits. JA 460, JA 453. A fourth form, called the North Point Expansion Agreement, set forth the understanding that at least five employees had to be enrolled and that the contract was subject to annual review for three years. JA 461, JA 135, JA 242, JA 243, JA 461. The fifth form, called the Professional Employer Organization (PEO) Services Acknowledgement Form, was an acknowledgement by the employer that all services available through North Point had been explained. JA 462 See also JA 243, JA 462. Finally, the employer signed something called the Professional Industrial Trade Workers Union Health & Welfare Fund Plan "B" Disclosure Form, JA 463, which stated that the plan was sponsored by the PITWU, that it was self-funded and exempt from state regulation under ERISA, that it was under the jurisdiction of the Department of Labor and not regulated by any state insurance department, and not covered by any state or federal guarantee fund in the event of insolvency. None of these many forms mentions either union dues or marketing fees (or indeed fees of any kind other than a one time processing fee and a $10 monthly billing fee set forth on the New Business Turn-In Form). See JA 457

Under the terms of the only plan documents that the employers saw (and particularly the New Business Turn-In Form), the total amount that the Fund would charge to provide insurance coverage was stated as an aggregate amount.[3] Participating employers testified that, although they later received

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[3] Participating employers then received invoices for subsequent months requiring payment through two checks, one to PCI/North Point and one to PCMG. See JA 135-136, 144, 464, 489-490, 141, 142, 464, 147, 148, 44, 48-49.

invoices that required them to cut two monthly checks made out to different entities, they did not understand that the checks represented payment for different services.[4] Instead, they understood only that the total amount paid was required as a means of obtaining health benefits for their employees through the Fund. Thus, the combined amount should be considered plan assets under "ordinary notions of property rights." AO 2005-08A, 2005 WL 1208695 (May 11, 2005); AO 99-08A, 1999 WL 343509, at *3 (May 20, 1999) (to identify plan assets "requires consideration of any contract or other legal instrument involving the plan, as well as the actions and representations of other parties involved"). According to the govern-ing documents, the employers were paying money to a funded trust (not for an insured arrangement), which was subject to ERISA and created for the purpose of paying benefits. Therefore, the payments are appropriately treated as plan assets.

Indeed, this understanding is bolstered by the limited information given to employers in the New Business packet. The disclosure form in this packet specified that the Fund was governed by ERISA and was not an insured arrangement. See JA 457. If the employers had simply bought a standard health insurance policy from an insurer licensed to do business in

[4] JA 138, 48-49, 502-504, 118-119, 123-125, 151-152, 178, 49-50.

their states, the premium amounts once paid would not have been plan assets. 29 U.S.C. § 1101(b)(2) (providing that, in the case of such a "guaranteed benefit policy," the plan's asset includes the policy, but not the underlying assets); see also 29 C.F.R. § 2509.75-2. However, here, the employers were required to acknowledge that the arrangement was not insured and that it was governed by ERISA, rather than state insurance law. Under ERISA, the assets of such a self-funded plan must generally be held in trust. 29 U.S.C. § 1103.

Moreover, ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), requires fiduciaries to act in accordance with "the documents and instruments governing the plan." Here, those documents – including the (ignored) Declaration and the agreements between PITWU and PCI/North Point –contemplated that amounts contributed by employers would be used by the Fund, without reference to any other deductions for any other purposes. Thus, the conclusion that the employers' payments were plan assets is supported by the governing documents, by the representation that the Fund was governed by ERISA rather than state insurance law, and by Doyle's and Holloway's complete failure to disclose any purpose for the payments other than obtaining health benefits.

The decision in Metzler v. Solidarity of Labor Organizations (SOLO) Health & Welfare Funds, 1998 WL 477964 (S.D.N.Y. 1998), as affirmed in a short per curiam decision in Herman v. Goldstein, 224 F.3d 128 (2d Cir. 2000), supports this position. In SOLO, a participating employer was required to make monthly contributions to a welfare fund in accordance with membership agreements that specified that the monthly amount included a $12 per month per employee fee and a service fee in an unspecified amount payable to the company, Medco, which solicited employers. When it received the monthly lump sum, Medco deposited the check in its own account and then issued checks from this account to pay the fund for the provision of benefits, and to pay the local union for association membership, retaining the rest for its own fees. The governing documents defined the "trust fund" to consist of the sum of the contributions and in turn specifically defined "contributions" to include "the amount payable to the Fund as well as the local membership fees and the "service fee payable to Medco." 1998 WL 477964, at *6. Given this definition, the court concluded that the entire amount, including the service fee, "may fairly be construed from the other governing documents . . . to constitute assets of the Fund." Id. In addition, the court noted that the "summary plan descriptions provided to employees and the invoices sent to clients fail[ed] to make any reference to the fees and commissions deducted by Medco from the stated employer contribution rates." Id. Thus, the court in SOLO concluded "that the total amount of the monthly employer contributions paid to Medco constituted assets of the Fund." Id. Accord In re Consolidated Welfare ERISA Litig., 839 F. Supp. 1068, 1070 (S.D.N.Y. 1993) (plan documents required all employer contributions to be paid into a trust fund and "did not specifically inform the employers that their payments included a broker commission").

Here, we do not have analogous contractual language that expressly indicated that the total amount paid was intended to constitute plan assets, and the participating employers paid PCMG in a separate check. However, as in the SOLO case, the governing documents here did not specify the amount or even existence of a marketing fee. Instead, the enrollment form required a single check and the only fees broken out were the one-time processing fee and a $10 monthly billing fee apparently per employee, the reasonableness of which we do not dispute. Moreover, all the governing documents refer to the use of employer's payments to fund a non-insured ERISA plan. Therefore, the full amounts paid in both checks should be deemed plan assets. The district court failed to address this argument at all.

Moreover, even if it is questionable whether the amounts paid by Check 2 to PCMG were plan assets, the district court seems to have assumed that the amounts paid by Check 1 were plan assets, as reflected by its apparent reliance on Doyle's testimony that Check 2 effectively segregated the non-plan assets. First, as noted above, the Declaration contemplated that at least some money contributed by the employers was to be paid into a trust fund and thus constitute plan assets. Second, the agreements between the PITWU and PCI/North Point specified that "the amounts shall be used by said health Fund for the purpose of financing the health Fund for the benefit of participating employees for the purpose of providing hospitalization, basic and major medical benefits," underscoring that these amounts must be understood to constitute plan assets. See JA 344, JA 436, JA 448. Finally, the enrollment materials clearly contemplated that participating employers would pay specified amounts to receive health benefits for their employees from PCI/North Point. Although these documents also indicated that employers could obtain other services from PCI/North Point, the uncontradicted evidence, including testimony from PCI/North Point's owners, established that no such services were actually requested or provided.[5] Instead, employers had no reason to expect PCI/North Point to use these payments for any purpose other than to provide health benefits to their employees under an ERISA welfare plan. Under

[5] See JA 163-165, JA 497-501, JA 119-120, JA 125-126, JA 149, JA 179-180.

normal notions of property, at least these payments must be viewed as plan assets.

D. The District Court Erred By Ruling That No Evidence Supported A Finding That the Fees Were Unreasonable When The Secretary Submitted Substantial Evidence That The Fees Were Paid For Services That Were Not Provided Or Were Not Necessary

1. Doyle's Fiduciary status

It is undisputed that Doyle, as owner and operator of PCMG, exercised sole control and authority over the amounts participating employers paid by Check 2. In addition, it is undisputed that, at least as of November 2002, Doyle also exercised control over Check 1. Doyle admitted on cross examination that as of November 2002, he negotiated checks and disbursed all funds from Check 1 (as well as Check 2) because PCI/North Point no longer had the staff to do billing:

> A. There probably were some union dues paid to the PITWU union during the course of our relationship.
>
> Q. Why would that be?
>
> As Mr. Maccariella stated in I'm sure his deposition, as I've stated, in November of 2002 he had approached me and asked me to conduct all of his billing because he fired his billing person. And at that point we did the billing and forwarded checks to the administrator as instructed, paid the PEO their fees as instructed, and paid the union.
>
> Q. Okay. When you say forwarded to the administrator, you mean the third party administrator to the health claims?

A. Yes, ma'am.

See JA 254– 255. Doyle's testimony is consistent with the Secretary's summary exhibits. See, e.g., JA 484 (showing that during the period of November 2002 through May 2003, through PCMG, Doyle distributed $645,232 to the Fund's administrator and health care services providers and distributed $29,025 to PCI/North Point even though it was performing no services for the Fund by November 2002).

Even if the district court concluded that the amounts in Check 2 did not constitute plan assets, the amounts in Check 1 clearly are plan assets, and Doyle is a fiduciary by virtue of his control over these plan assets. 29 U.S.C. § 1002(21)(A) (defining as a fiduciary any person who "exercises any authority or control respecting management or disposition of [a plan's] assets").

The district court did not address the Secretary's plan asset argument at all, and it made no explicit findings as to whether Check 2 or Check 1 funds were plan assets; however, the court appears to have assumed that Check 1 funds were plan assets (JA 18) when it incorrectly concluded that Doyle was not a fiduciary because he "kept PCMG's consultant fees and profits separate by virtue of 'check 2' in an effort not to commingle funds" (JA 18). The district court incorrectly concluded, however, that Doyle "forwarded all monies which he was required to present." Id. As discussed below, in fact, the district court's own findings establish that Doyle retained at least $755,000 from Check 1.

The district court found that Doyle received $4.5 million in Check 1 funds, but forwarded from Check 1 only "$645,000 to third party administrators and medical providers," and forwarded only $3.1 million to PCI/North Point, leaving unaccounted for $755,000 in plan assets (JA 15).[6] Participating employers paid $7.4 million to participate in the Fund, but only $2,745,000 was used to pay benefits ($2.1 million from PCI/North Point and an additional $645,000 from Doyle). Id. Thus, the unaccounted for $755,000 equals 37% of all sums paid for benefits. From the participants' point of view, this was a significant sum which was entrusted to Doyle and for which he should account. The burden to render an accounting for funds entrusted to the fiduciary falls on the fiduciary. See generally Restatement (Second) of Trusts, § 172 (duty to render accounts); Welsh v. United States, 844 F.2d 1239, 1245 (6th Cir. 1988) (courts allocate the burden of proof to the party in a better position to produce the required proof; the evidence of what funds were received by the fiduciary and how they were applied is likely to be more accessible to the fiduciary than to the principal); In Re

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[6] See JA 484-485 showing distributions PGMC made from Check 1 from November 2002 through May 2003.

Pressman-Gutman, 459 F.3d 383, 400 (3d Cir. 2006), quoting Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 250 (2000) (the common law of trusts "offers a starting point for analysis of ERISA unless it is inconsistent with the language of the statute, its structure, or its purposes"). The district court did not address the missing funds, but the Secretary showed that PCMG retained this sum from Check 1 and, indeed, the findings of the district court demonstrate the missing funds.

2. Doyle's Breaches of Fiduciary Duty

At the very least, the fact that Doyle controlled Check 1 funds made him a fiduciary, and the fact that he retained at least $755,000 from Check 1 without providing any discernable services in return constitutes a breach. Further, the payment of both union dues and fees to PCI/North Point out of the assets collected by Check 1 were not legitimate plan expenses. First, although participants may be required to pay union dues to participate in a union-sponsored plan, dues cannot be paid from plan assets. See 29 U.S.C. §§ 1103, 1104(a)(1)(A) (prohibiting the use of plan assets for anything other than the exclusive purpose of providing benefits and defraying plan expenses); 29 U.S.C. § 1106(a)(1)(D) (prohibiting the transfer of plan assets to a union, as a party in interest to the plan).

Moreover, here, the expenditure of plan assets on "union dues" is particularly egregious because the Secretary presented evidence, which the district court ignored, including participant testimony and testimony of the defendants themselves, that the union performed none of the traditional functions of a union, and that the agreement was not intended to affect the working conditions of employees, and the employers and employees did not know about the union dues. For example, Elliot Davis testified that he participated in the Fund from January through December 2002, but his office had no collective bargaining agreement with PITWU, he did not consider himself to be part of a union, and he was not aware of any services that PCI/NorthPoint provided. See JA 10-11, n.5 (collecting participant/employer witness testimony). Again the court erred in entering judgment in Doyle's favor because, although the court apparently credited Doyle's testimony that PITWU was a real union, the court did not consider or address this countervailing evidence,[7] and incorrectly found that the

[7] Rather than address this evidence, the district court categorically discounted it with the rationale that "[t]here was no signed enrollment forms in evidence from any of these employers." JA 11, n. 5. No defendant raised this objection and each participant or employer witness was identified in the pretrial order without objection. Further, there is no evidence in the record to suggest that any of these participants were not in the Fund when they incurred and submitted the claims or when the Fund failed to pay their claims.

Secretary did not introduce any evidence that the "fees were excessive or unreasonable." In fact, the Secretary introduced uncontroverted evidence that the union and other fees were wholly unreasonable.

The Secretary argued that the other expenses paid out of Check 1 were also illegitimate because they were not in exchange for any discernable services. This argument is supported by the uncontradicted testimony which established that the participating employers did not receive any services from PCI/North Point other than health benefits for employees and the only processing fee specified for those services was the $10 monthly billing fee specified in the New Business Turn-In Form, an expense that the Secretary does not challenge.

Although it was PCI/North Point that actually deducted the union dues and the other expenses from Check 1 (at least before November 2002), at a minimum, the evidence shows that Doyle violated his duties as a co-fiduciary under ERISA section 405(a), 29 U.S.C. § 1105(a), with regard to these payments. Under section 405, a fiduciary may be held liable for the breaches of other fiduciaries if he "knowingly" participates in such breaches or enables the other fiduciaries to commit their breaches. Not only did Doyle stipulate that he knew that PCI/North Point used employer contributions for purposes unrelated to paying claims, his testimony shows that he knew or had reason to know the precise amounts that PCI/North Point retained and that some of these amounts were (ostensibly) for union dues, and the Secretary presented evidence that Doyle was named in the state cease and desist orders that determined that the Fund was not a collectively-bargained plan.[8] Regardless of whether Doyle himself diverted the Check 1 amounts, he is liable for the improper diversion of the plan assets as a co-fiduciary. See Silverman v. Mutual Ben. Life Ins. Co., 138 F.3d 98, 106 (2d Cir. 1998) ("Section 1105(a)(3) provides for extraordinarily broad liability for co-fiduciaries because it requires only that the defendant be a fiduciary of the same plan as the breaching fiduciary, not that they be

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[8] Doyle's testimony showed that he knew the magnitude of the amounts PCI/NorthPoint took. As the district court found, PCMG received checks totaling $6.6 million from "employer participants" ($4.5 million was submitted as "Check 1" and $2.1 million was submitted as "Check 2") (JA 15). It also found that PCMG forwarded to PCI/North Point only $3.1 million. Id. As to the $3.1 million that Doyle forwarded, Doyle testified that he knew PCI/North Point retained the following amounts: from the $205 paid by an individual employee, it retained $83 and forwarded only $122; from an employee plus one dependent, it retained $115, and forwarded only $270; for a family, it retained $132, and forwarded only $350. See JA 244-245, JA 483-484, JA 428. Given that PCMG knew how many Fund participants were enrolled in each category and how much PCI retained from each category, Doyle knew or had reason to know the dollar amounts the Fund received (e.g., only $2.1 million or 68% of the $3.1 million PCI/North Point received). Moreover, Doyle knew that the employer contributions to the Fund were deposited in the PCI/NorthPoint operating checking account, and that PCI/North Point spent at least some of this money for purposes unrelated to paying claims. JA 39-JA40.

fiduciaries with respect to the same assets."); In re Polaroid ERISA Litig., 362 F. Supp. 2d 461, 480 (S.D.N.Y. 2005) ("fiduciaries may be liable under § 1105(a) even if their co-fiduciary's breach is beyond the scope of their own discretionary authority.").

As to Check 2, Doyle and Holloway breached their fiduciary duties because the payment of any amount of marketing fees out of plan assets was improper. A union cannot use plan assets to recruit new union members. And neither PCMG, PCI/North Point, nor PITWU Union provided any useful service to the Fund. Thus, it was unnecessary to introduce additional evidence that these fees were excessive or not a prudent use of plan assets under the facts of this case. Any expenditure of plan assets for union dues or nonexistent services was unnecessary and excessive and therefore imprudent and disloyal.

As to amounts diverted from Check 2, Doyle acted imprudently and not for the sole purpose of providing benefits and defraying reasonable expenses by retaining marketing fees that, as witness testimony showed, were not discussed, agreed to or indeed disclosed. See Harte v. Bethlehem Steel Corp., 214 F.3d 446, 452 (3d Cir. 2000) (failure to disclose material information can constitute a breach of fiduciary duty). This testimony is bolstered by the plan documents which, as discussed, also do not disclose the existence or extent of these fees. Although Doyle had a practice of submitting two checks, he did not adequately inform participating employers of the existence or nature of the marketing fees.

Finally, it was disloyal and imprudent to expend any amount of plan assets for marketing a scheme which numerous states had already attempted to enjoin through cease and desist orders. Indeed, Holloway herself cited these orders in her resignation letter. Because Doyle diverted or facilitated the diversion of plan assets for these illegitimate purposes, he breached his duties as an ERISA fiduciary and should be held personally liable for the resulting loss to the Fund. The district court did not address the state cease and desist orders except to note that "this is not an NLRA case." JA 19.

The district court ignored substantial, probative evidence the Secretary produced without comment or categorically discounted evidence citing a questionable rationale. In dismissing the Secretary's claims against Holloway and Doyle, the district court erroneously noted that the Secretary introduced no evidence to show that the money "coming into the Fund was too low for the number of participants in the Fund" (JA 17) or evidence that when the Fund closed in May 2003 any claims remained unpaid. Id. In fact, the Secretary introduced uncontroverted evidence that, as of October 31, 2002, the unpaid claims totaled $7,685,391. JA 486. This evidence was consistent with other substantial evidence of unpaid claims including, for example: (1) trustee minutes describing "boxes of unpaid claims" (JA 465-JA 480); (2) Holloway's resignation letter describing the "insolvency of the fund" as a reason for her resignation; and (3) the testimony of participants describing their unpaid claims (JA 10-11, n. 5).

There was no evidence and indeed no reason to believe that these claims were paid before the Fund collapsed. Moreover, any burden of showing the precise amount of any unpaid claims should be placed on the fiduciaries given their failure to maintain claims records from which such liability could accurately be determined. See, e.g., Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) ("Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate."); cf. In re Unisys Plan Sav. Litig., 173 F.3d 145, 160 (3d Cir. 1999) (declining to decide whether fiduciaries bear the burden of proving causation of damages after the plaintiff has proved a breach).

CONCLUSION

For the reasons stated above, the Secretary respectfully asks this Court to reverse and remand this case to the district court with instructions directing it to require Holloway and Doyle to account for all plan assets entrusted to them and to make appropriate findings of fact and conclusions of law.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor

/s/ Elizabeth Hopkins
ELIZABETH HOPKINS
Counsel for Appellate
and Special Litigation

MARCIA BOVE
Senior Trial Attorney
U.S. Department of Labor
Plan Benefits Security Division
200 Constitution Ave., N.W.
Room N-4611

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/s/ Elizabeth Hopkins
ELIZABETH HOPKINS
Counsel for Appellate and Special Litigation
U.S. Department of Labor, Plan Benefits Security Division
Dated: March 16, 2010

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I hereby certify that a virus check, using McAfee Security VirusScan Enterprise 8.0, was performed on the PDF file and paper version of this brief, and no viruses were found.

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Counsel, U.S. Department of Labor,
Plan Benefits Security Division
Dated: March 16, 2011

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Rules 28.3(d) and 46.1(e), the undersigned counsel certifies that she has been admitted to this Court.

Dated: March 16, 2010

/s/ Elizabeth Hopkins
ELIZABETH HOPKINS

CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on this 16th day of March, 2011, true and correct copies of the foregoing – THE SECRETARY OF LABOR'S OPENING BRIEF SHOWING CITATIONS TO JOINT APPENDIX – were filed electronically with the Clerk of the Court for the United States of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that I caused 10 copies of the Brief to be dispatched to the Clerk of this Court by UPS. I further certify that I served this Brief electronically via email on the following counsel of record:

Keith R. McMurdy, Esq., Fox Rothschild
100 Park Ave. Suite 1500
New York, NY 10017-0000

I also certify that I served the Brief on James Doyle, Michael Garnett and Mark Maccariella by U.S. mail, postage prepaid at the address below:

James M. Doyle
28 Sirius Court
Sewell, NJ 08080

Michael Garnett
1211 Sandpiper Lane
Lantana, FL 33462

Mark Maccariella
910 Lincoln Drive
Voorhees, ZNJ 08043

/s/Marcia Bove
MARCIA BOVE

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I, Marcia E. Bove, certify that the text of the electronically filed Opening Brief of The Secretary Of Labor is identical to the text in the paper copies of that brief.

/s/ Marcia E. Bove

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